DIVISION I

ARKANSAS COURT OF APPEALS

NOT DESIGNATED FOR PUBLICATION

ROBERT J. GLADWIN, JUDGE

CA05-1175

MAY 10, 2006

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[NO. CV04-8714/B]

HON. COLLINS KILGORE, JUDGE

AFFIRMED IN PART; REVERSED IN PART

GEORGE ALEXANDER BROWN
APPELLANT

V.

BARRON L. McMILLIAN
APPELLEE

Appellant George Brown brings this appeal from the judgment of the Pulaski County Circuit Court awarding appellee Barron McMillian judgment in the amount of $6,000 for the conversion of a Mercedes Benz automobile and $2,000 in attorney fees.[1] Brown raises six points for reversal. We affirm in part and reverse in part.

In February 2000, McMillian and Virginia Alexander entered into an agreement whereby McMillian was to purchase Alexander's 1988 Mercedes Benz. The sales price was to be $12,500. McMillian made a $1,000 down payment and financed the remaining balance of $11,500 at eight percent interest. The agreement called for forty-four monthly

[1]Virginia Alexander is listed as an appellant in this case. Alexander was originally named a defendant. However, appellee McMillian took a nonsuit as to her prior to trial.

payments of $302.43, for a total amount due of $14,306.92. On March 26, 2003, McMillian, through an agent, asked Alexander for the payoff amount on the vehicle and was told by Alexander that it was $825.24. On March 31, 2003, McMillian purchased and delivered to Alexander a cashier's check for $825.24. After an exchange of correspondence between Alexander's son, appellant George Brown, and McMillian's attorney, Steve Durand, as to whether further payments were due, Brown repossessed the vehicle on June 21, 2003, including McMillian's personal property contained within the vehicle.

McMillian filed suit against Brown and Alexander in the Pulaski County District Court, seeking damages for the alleged conversion of the vehicle. Brown, acting pro se, answered, explaining his version of the events. After a trial in district court, Brown appealed to the Pulaski County Circuit Court. In circuit court, McMillian amended his complaint. Brown, still proceeding pro se, answered the amended complaint, denying the material allegations.

The case was tried to the court sitting without a jury. Linda Parham, a certified public accountant, testified that she assisted McMillian in paying off the vehicle by calling Virginia Alexander to get the payoff amount and being given the amount of $825.24. She identified a cashier's check that she instructed McMillian to purchase and noted that the check bore the notation "paid in full." Parham also identified a list of figures Alexander used to calculate the payoff amount. She stated that, in her

conversations with Alexander, Alexander appeared very lucid, smart, and alert. She said that it was at her instruction that McMillian wrote "payment in full" on the check. She stated that she obtained the payoff over the telephone but that the check was personally delivered to Ms. Alexander. Parham admitted on cross-examination that she had not seen the paperwork for the transaction or the documentation as to how many payments McMillian made. She also stated that she relied on the payoff amount she had received from Alexander.

Barron McMillian testified that he was the owner of the vehicle and that he made all of the payments, including funds for the down payment from attorney Steve Durand's escrow account. He stated that he purchased the cashier's check and delivered it to Ms. Alexander. He said that Linda Parham asked him to write "payment in full" on the check. According to McMillian, Brown contacted him, asserting that the check was "not good," and repudiated McMillian's agreement with Alexander. He said that Brown later sold the car at auction for $1,800 and kept the proceeds for himself. McMillian opined that the fair market value of the vehicle was $9,000 at the time Brown took it. On cross-examination, he stated the he did not recall missing any payments but that he may have made two payments in one month. McMillian denied missing six or seven payments, stating that Alexander and Brown would have repossessed the vehicle before that time. He conceded that the vehicle was wrecked on two occasions and that he received insurance payments for the damage, payable to himself, not Virginia Alexander. He stated that he endorsed

the check as instructed by the insurance company. McMillian said that he purchased the vehicle from Brown even though it was in Alexander's name. He also asserted that he had the vehicle licensed and insured in his name and that Steve Durand had no interest in the vehicle. He stated that it would not surprise him to learn that he made thirty-three payments but that it would surprise him to learn that he still owed $2,500. He also denied that he originally agreed to pay approximately $13,603.92 or that he agreed to pay $1,806.92 in finance charges.

Virginia Alexander testified that she did not remember how many payments McMillian made but believed that he had missed two or three. She also did not recall the cashier's check having the notation "payment in full" written on it. Alexander said that she was a bookkeeper for twenty or thirty years. She said that she created an exhibit showing that she had made a list of McMillian's payments and arrived at the payoff figure of $825.24, but she asserted that she miscalculated the amount due because she did not include interest or other expenses. She admitted that she received a check for $825.24 but stated that she thought that this was just another payment. According to Alexander, over $1,000 was still owed after she received the cashier's check.

The trial court ruled from the bench, finding in McMillian's favor. The court stated that it was giving more weight to McMillian's evidence and that Ms. Alexander's testimony was the most persuasive. Alexander was found to be a very lucid witness. The court noted that there were divergent figures as to the value of the vehicle — McMillian

had paid nearly $10,000, although Brown sold the car at auction for $1,800. The court also noted that there was no evidence as to the value of the items of personal property in the car at the time of the conversion. The court concluded that a fair value for the vehicle would be $6,000, and McMillian was awarded $2,000 for attorney fees. Judgment was entered accordingly.

Brown retained an attorney and filed a timely motion for new trial, alleging that the award of attorney fees was improper in a tort case. The motion also asserted that the check introduced by McMillian did not bear the notation "paid in full" when it was paid by the bank. These errors, according to Brown, justified a new trial. The trial court denied the motion, and this appeal followed. After the trial court denied the motion for a new trial, Brown also filed a "Motion to Lodge Affidavit" wherein an officer with Regions Bank states that the cashier's check that cleared the bank did not bear the notion "paid in full."

Brown raises six points on appeal: (1) that the trial court's findings were clearly against the preponderance of the evidence because it was clear that the debt on the vehicle was still outstanding, making conversion impossible; (2) that appellee's exhibit 3, a check marked "paid in full," was highly irregular and different from the exhibit produced in a post-trial motion and not marked "paid in full"; (3) that the trial court erred in allowing attorney fees in a tort case; (4) that the trial court erred in failing to consider that McMillian was only a co-owner; (5) that the trial court erred in failing to consider that the

actual value of the vehicle was $1,800 when it awarded damages of $6,000; (6) that the trial court disregarded the fact that Virginia Alexander did not receive any portion of the insurance check.

In bench trials, the standard of review on appeal is whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Found. Telecomms., Inc. v. Moe Studio, Inc.*, 341 Ark. 231, 16 S.W.3d 531 (2000); *Neal v. Hollingsworth*, 338 Ark. 251, 992 S.W.2d 771 (1999). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, when considering all of the evidence, is left with a definite and firm conviction that a mistake has been committed. *Neal*, *supra*. This court views the evidence in a light most favorable to the appellee, resolving all inferences in favor of the appellee. *Ark. Transit Homes, Inc. v. Aetna Life & Cas.*, 341 Ark. 317, 16 S.W.3d 545 (2000). However, a trial court's conclusion on a question of law is given no deference on appeal. *Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000); *City of Lowell v. M&N Mobile Home Park, Inc.*, 323 Ark. 332, 916 S.W.2d 95 (1996).

Brown's first point is that the trial court erred in finding that the debt had been paid.

Brown argues that the trial court erred because Virginia Alexander testified she made a mistake in calculating the payoff amount by not including interest or other expenses that may have been owed, thereby making the repossession proper. As the fact-finder, it was

within the trial judge's province to believe or disbelieve the testimony of any witness. *Found. Telecomms., Inc.*, *supra*. Further, Linda Parham testified that she spoke with Alexander and was told by Alexander that the check was payment in full. McMillian testified that he did not recall any missed payments and that he demonstrated to Brown that he (McMillian) had paid Alexander in full. Given this conflicting testimony, whether Alexander made a mistake in calculating the payoff amount was a matter of fact for the circuit court to determine. It is for the trial court, sitting as the trier of fact, not this court, to determine the credibility of witnesses and to resolve any conflicts in their testimony. *Jocon, Inc. v. Hoover*, 61 Ark. App. 10, 964 S.W.2d 213 (1998). We affirm on this point.

In his second point, Brown argues that the cashier's check purchased by McMillian and marked "paid in full" was contrary to the copy Brown obtained from the bank that was not marked "paid in full" and that this "irregularity" entitled him to a new trial. We disagree.

The check is not an "irregularity" that would entitle Brown to a new trial under Ark. R. Civ. P. 59. First, surprise is the only possible ground for a new trial listed in Rule 59 applicable to this case. However, Brown was not surprised, because the check had become an issue in the district court. Brown was therefore aware of the problem with the check and should have had a copy to introduce in circuit court. Second, the check is not the issue; rather, the issue is whether McMillian had paid for the vehicle. Payment is a fact independent of the check. The check itself is an entity, a thing, susceptible of proof,

in a judicial proceeding, by the production thereof for the inspection of the court or jury. Payment is an intangible thing which cannot be so produced to prove itself. *Chi. Art Co. v. Thacker*, 63 S.E. 770 (W. Va. 1909); *see also Canady v. Canady*, 285 Ark. 378, 687 S.W.2d 833 (1985); *JAG Consulting v. Eubanks*, 77 Ark. App. 232, 72 S.W.3d 549 (2002). We affirm on this point.

Brown next argues that the trial court erred in allowing attorney fees in a tort case. McMillian argues that this point is not preserved because Brown did not object at trial. However, from a practical standpoint, Brown objected at the first opportunity. The trial court ruled from the bench, and asked McMillian's attorney for a suggestion as to a reasonable fee. Brown was proceeding pro se at the time. After the judgment was entered, Brown retained an attorney and filed a motion for a new trial, asserting error in the fee award. Further, even though the trial court ruled from the bench in awarding fees, such an award is not effective until a written order is entered. *Standridge v. Standridge*, 298 Ark. 494, 769 S.W.2d 12 (1989); *Filyaw v. Bouton*, 87 Ark. App. 320, __ S.W.3d __ (2004).

The general rule in Arkansas is that attorney fees are not awarded unless expressly provided for by statute or rule. *Sec. Pac. Housing Servs., Inc. v. Friddle*, 315 Ark. 178, 866 S.W.2d 375 (1993). Arkansas Code Annotated section 16-22-308 (Repl. 1999) provides for a reasonable attorney fee in certain civil actions, including actions to recover on promissory notes and for breach of contract. This statute does not, however, provide

for the recovery of attorney fees in tort actions. *Nef v. Ag Servs. Of Am., Inc.*, 79 Ark. App. 100, 86 S.W.3d 4 (2002); *Reed v. Smith Steel, Inc.*, 77 Ark. App. 110, 78 S.W.3d 118 (2002). The prevailing party in a conversion action is not entitled to an award of attorney fees. *Mercedes-Benz Credit Corp. v. Morgan*, 312 Ark. 225, 850 S.W.2d 297 (1993); *Nef*, *supra*.

McMillian argues that the amended complaint contains references that, he asserts, indicate that the action is also one for breach of contract, for which attorney fees can be recovered. However, it is clear that this action is a tort action for conversion. McMillian's amended complaint states that he is seeking damages against Brown for harassment and conversion. Brown was not a party to the contract between McMillian and Alexander and, as such, would not be liable for breach of that agreement. He could only be liable in tort for interference with that agreement. A further indication that McMillian was asserting a cause of action in tort is that he was seeking punitive damages. *See L.L. Cole & Son, Inc. v. Hickman*, 282 Ark. 6, 665 S.W.2d 278 (1984). We reverse on this point.

In his fourth point, Brown argues that the trial court erred in failing to consider that McMillian was only a co-owner of the vehicle. He makes a two-sentence argument without citing any authority for the proposition, nor does he develop the argument any further. It is well settled that this court does not consider arguments that are unsupported by convincing argument or sufficient citation to legal authority. *Norman v. Norman*, 347 Ark. 682, 66 S.W.3d 635 (2002).

Brown's fifth point is that the trial court erred in failing to consider that the actual value of the vehicle was only $1,800 when it awarded damages in the amount of $6,000. Brown is relying on his sale of the vehicle at auction for $1,800 to establish the value of the vehicle and limit the damages. However, McMillian testified that, in his opinion, the vehicle was worth $9,000. Our courts have consistently allowed the property owner to give his or her opinion of the value of the property. *Zhan v. Sherman*, 323 Ark. 172, 913 S.W.2d 776 (1996); *Hickman v. Carter*, 315 Ark. 678, 870 S.W.2d 382 (1994); *Minerva Enter., Inc. v. Howlett*, 308 Ark. 291, 824 S.W.2d 377 (1992); *Walt Bennett Ford, Inc. v. Brown*, 283 Ark. 1, 670 S.W.2d 441 (1984). Testimony by an owner can constitute substantial evidence of the damages. *Stipp v. Jenkins*, 239 Ark. 15, 386 S.W.2d 695 (1965). Further, the proper measure of damages in a conversion case is the fair market value at the time and place of the conversion. *JAG Consulting*, *supra*. Thus, the price obtained at an auction is not necessarily the fair market value of the vehicle. *See White River Limestone Prods. Co. v. Mo.-Pac. RR. Co.*, 228 Ark 697, 310 S.W.2d 3 (1958); *JAG Consulting*, *supra*. We cannot say that the trial court's award of damages was clearly erroneous because it is within the range of values supported by the evidence. We affirm on this point.

Finally, as his sixth point, Brown argues that the trial court disregarded the fact that Virginia Alexander was still a co-owner when McMillian received two checks from his insurance company for damage to the vehicle. As in his fourth point, Brown makes a

short argument without citation of authority or an explanation of the point's relevance. We affirm on this point. *Norman*, *supra*.

Affirmed in part; reversed in part.

GRIFFEN and NEAL, JJ., agree.